Dissenting Views to Accompany
H.R. 4571, the "Frivolous Lawsuit Reduction Act"

We strongly oppose H.R. 4571, the so-called "Frivolous Lawsuit Reduction Act."

The legislation will have a significant, adverse impact on the ability of civil rights plaintiffs to seek recourse in our courts, will operate to benefit foreign corporate defendants at the expense of their domestic counterparts, and will massively skew the playing field against injured victims. This sweeping overhaul of our civil justice system is being completed on the thinnest conceivable record of a single cursory hearing and the basis of a few anecdotes and hypothetical concerns. The legislation is opposed by numerous civil rights, consumer and judicial groups, including, the United States Judicial Conference, the NAACP, Public Citizen, the Alliance for Justice, People for the American Way, the American Association of People with Disabilities, the Lawyers' Committee for Civil Rights Under Law, the American Bar Association, the National Conference on State Legislatures, National Partnership for Women, National Women's Law Center, the Center for Justice & Democracy, Consumers Union, National Association of Consumer Advocates, USAction, U.S. PIRG, and the Legal Defense Fund. For these and the reasons set forth herein, we dissent from this legislation.

Description of Legislation

Section 2 of the bill makes a number of changes to Rule 11 of the Federal Rules of Civil Procedure concerning attorney sanctions for improper pleadings and motions.[1] First, it would revert to the pre-1993 rules by removing a court's discretion to impose sanctions on improper and frivolous pleadings (*e.g.*, it makes the sanctions mandatory, rather than discretionary). Second, it would eliminate the current "safe harbor" provision permitting attorneys to withdraw improper or frivolous motions 21 days after they are challenged by opposing counsel.[2] Third, it would eliminate the provision providing that the sanction rules do not apply to discovery violations.[3]

Section 3 of the bill applies this new Federal Rule 11 to state cases that affect interstate commerce and requires the judges to make this determination within 30 days after the filing of the motion for sanctions.

Section 4 of the bill alters both federal and state jurisdiction and venue rules. It provides that plaintiffs may "only" be filed in the state and county (or federal district) where the plaintiff resides, where the injury took place, or where the defendant's principal place of business is located. As such, it eliminates the possibility of a harmed victim pursing a corporate defendant where it is incorporated and in many states where it is found to be doing business. It also contains a "most appropriate forum" provision, which mandates dismissal of the lawsuit (rather

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[1]Since these changes amend the Federal Rules of Civil Procedure, they are all subject to modification or revision by the federal judiciary pursuant to the Rules Enabling Act.

[2]Currently, no withdrawal right exists for court-initiated sanctions.

[3]Such violations are already subject to mandatory sanctions under Rule 26 (g) of the Federal Rules.

than transfer) if the court determines another forum "would be the most appropriate forum."

Section 5 of the bill is a rule of construction, stating that the proposed Rule 11 modifications are not to be construed to bar or impede the assertion or development of "new claims or remedies under the civil rights laws."

Section 6, added to the bill by an amendment offered by Mr. Keller, requires judges to sanction an attorney if the court determines that the attorney has violated Rule 11 three times in his or her entire career (a so-called "three strikes and your out" provision). The required sanction is suspension from the practice of law in that district court for at least one year. This sanction appears to apply retroactively, to violations that occurred before this new statute takes effect.

Finally, Section 7, added to the bill by an amendment offered by Mr. Scott, provides for enhanced penalties for parties who destroy documents concerning a legal proceeding.

I. The Rule 11 and the "Three Strikes and Your Out" Provision will have a Chilling Impact on Civil Rights Actions

By requiring a mandatory sanctions regime that would apply to civil rights cases, H.R. 4571 will chill many legitimate and important civil rights actions. This is due to the fact that much if not most of the impetus for the 1993 changes stemmed from abuses by defendants in civil rights cases – namely that civil rights defendants were choosing to harass civil rights plaintiffs by filing a series of rule 11 motions intended to slow down and impede meritorious cases.

For example, a 1991 Federal Judicial Study: The Federal Judicial Center's Study of Rule 11 found that "The incidence of Rule 11 motions or sua sponte orders is higher in civil rights cases than in some other types of cases." Another study showed that "civil rights case made up 11.4% of federal cases filed, [and] that 22.7% of the cases in which sanctions had been imposed were civil rights cases."[4]

Another recent study found that "revisions to Rule 11 (the 1993 amendments) alleviate what was perceived as the rule's disproportionate impact on civil rights plaintiffs. Under the 1983 version, both the fact that sanctions were mandatory and that there was a significant risk that a large attorney fee award would be the sanction of choice were believed to have had a stifling effect on the filing of legitimate civil rights claims ... Furthermore, there is ample evidence to suggest that plaintiffs and civil rights plaintiffs in particular, were far more likely than defendants to be the targets of Rule 11 motions and the recipients of sanctions."[5]

As Professor Theodore Eisenberg, Professor Law, Cornell University testified before the

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[4]Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943 (1992).

[5]Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 OHSLJ 1555, 1568 (2001).

House Judiciary Committee, "A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be discouraging the civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported abuse in an area of law, personal injury tort, found to have less abuse than other areas."[6]

A good example of the effect of this rule on civil rights cases was cited by the Honorable Robert L. Carter, United States District Court Judge for the Southern District of New York, when he stated: "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown v. Board of Education*] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start."[7]

The language in the bill that purports to mitigate the damage to civil rights cases is not sufficient to alleviate our concerns. Section 5 of the bill states that the proposed Rule 11 changes shall not be construed to "bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." The problem is the language does not clearly and simply exempt civil rights and discrimination cases, as should be the case. Determining what a "new claim or remedy" is will be a daunting and complex issue for most courts and clearly does not cover all civil rights cases in any event.

For similar reasons we object to Section 6, added to the bill in the markup by Rep. Keller, which provides that if a court finds that an attorney has violated Rule 11 three times, the court must suspend the attorney from practice for at least one year. We object to this provision because like the Majority's Rule 11 changes, it will have a chilling effect on civil rights cases. Here the impact could well be worse than the Rule 11 amendments, because there is no rule of construction concerning civil rights to mitigate the harm to any extent. Even more egregiously, as drafted, the three strikes penalty would appear to apply on a retroactive basis. This means a civil rights attorney could have his license suspended for violations that occurred before this penalty regime even existed.[8]

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[6]*Uncertain and Certain Litigation Abuses,, 2004: Hearings on "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse" Before the Comm. on the Judiciary*, 108th Cong. (2004) (statement of Theodore Eisenberg, Professor, Cornell University).

[7]Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2193 (June 1989).

[8]Mr. Keller (R-FL) claims that he offered this provision because it is based on language offered by Senator Edwards, who introduced a bill with Senator Durbin providing for a "three strikes and your out" attorney sanctions regime for medical malpractice cases. S. 1374, 108th Cong. (2004). The problem with this line of argument is that the Senate Republicans rejected the Edwards proposal. Moreover, the Edwards proposal specifies that upon the third frivolous filing, the judge is required to refer the attorney to disciplinary proceedings. It does not mandate a one-year suspension, but rather leaves that decision to the State Bar.

Finally, H.R. 4571 does not provide an attorney with the ability to appeal a Rule 11 sanction. History has demonstrated that civil rights lawsuits are extremely unpopular, particularly in certain parts of the country where some judges almost automatically consider civil rights cases frivolous. In such courts, plaintiffs' attorneys would unreasonably be subject to sanctions, and even suspension, without appeal contrary to the purpose of Rule 11.

II. The Sweeping New Forum Shopping Provision will Unfairly Benefit Foreign Corporations to the Disadvantage of their U.S. Competitors and Unfairly Omits Business Litigation from its Scope

A. Section 4 Will Benefit Foreign Corporations

We are particularly offended by Section 4 of the bill, which would recast state and federal court jurisdiction and venue in personal injury cases.

Our most significant concern is that the provision would operate to provide a litigation and financial windfall to foreign corporations at the expense of their domestic competitors. This is because, instead of permitting claims to be filed wherever a corporation does business or has minimum contacts, as most state long-arm statutes provide, Section 4 only permits the suit to be brought where the defendant's principal place of business is located.[9] This means that it will be far more difficult to pursue a personal injury or product liability action against a foreign corporation in the United States.

Consider the case of a U.S. citizen that is harmed by a product produced or manufactured by a foreign competitor. If that foreign company transacts business or has minimum contacts in a state other than the state of the plaintiff's residence or where the injury occurred, as is often the case, any suit against the foreign company would be banned by H.R. 4571. In other words, the harmed U.S. citizen would have no recourse against a foreign corporation, whereas he or she would have recourse against a comparable U.S. corporation. This is unfair to both the U.S.

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[9]As a threshold, it is quite problematic even determining how the forum shopping provision would apply. Depending upon the meaning of the term "only" in the phrase "may be filed only in the state ...," the provision could be read as (1) creating a new grant of jurisdiction and venue, or (2) merely limiting the current rules to the specified new rules. If it is a new grant of jurisdiction and venue, the section would serve to authorize suits wherever plaintiffs reside or were injured, even if there are no minimum contacts with the defendant. This would lead to an explosion in cases, and would decimate years of Supreme Court decisions holding that defendants may only be sued where jurisdiction lies (*Pennoyer v. Neff*, 20 A.L.R. 3d (1201)) or where the defendant has minimum contacts (*International Shoe Co. v Washington,* 326 U.S. 310 (1945)). If the provision operates as a limit on the current rules, it would represent a significant federal usurpation of state court rules, possibly in violation of the Commerce Clause and the Tenth Amendment. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), striking down the Violence Against Women Act and the Gun Free School Zone Act as unconstitutional, holding that Congress lacked the authority to pass laws that have only an attenuated affect on interstate commerce.

citizen and all U.S. companies that compete against the foreign firm. It is hard for us to understand why the Congress would want to pass a law that grants foreign companies such a financial windfall at the expense of U.S. firms.

The bill forces this absurd result because it is drafted from the premise that every personal injury suit is brought against a business defendant headquartered in the U.S. In the real world, of course, this is not the case. The result is that not only do foreign corporations receive a financial windfall under the bill, but so does every possible defendant who is not a U.S. corporation. Thus legal actions brought against individuals who do not have minimum contacts with the state the victim resides in or is injured, but do have contacts with other states, would be barred by H.R. 4571. Similarly, personal injury cases brought against aliens, foreign states, and state and federal officials all would be much harder, if not impossible, to pursue if H.R. 4571 were to become law.[10]

B. Section 4 Will Place Victims at a Significant Litigation Disadvantage Compared with Corporate Defendants

It is difficult to consider H.R. 4571 as even-handed litigation reform, when it is drafted to so obviously benefit corporate defendants.

Consider the operation of subsection (b), requiring a court to dismiss properly filed legal claims if it determines another forum would be "the most appropriate." We are aware of no legal precedent for a court having such open-ended authority to dismiss lawful actions. The problems and unfairness with this provision are many. First, of course, is the ambiguous, open-ended wording. The legislation gives absolutely no guidance as to what a court is to take into account in determining which court is "most appropriate." Is it nexus to the injury? Nexus to the plaintiff? The defendant? The bulk of other claims? Until this issue is worked out, significant hardships will no doubt result. While defendants do not mind waiting, the confusion would work a significant disadvantage to harmed victims in immediate need of compensation.

Beyond this, mandating dismissal would seem to be an extreme and costly remedy as compared to simply transferring the case to another court. It is also unclear from the drafting whether or not the finding of the first court that a second court is most appropriate binds the second court under general rules of preclusion. If it is binding, the first court might make an egregious error and stick an inappropriate second court with a case that does not belong there. Or, if the decision is not binding, then plaintiffs' lawsuits could get bounced around by a string of courts all asserting that another court is most appropriate. It is also unclear whether a dismissal is appealable, which could cause huge delays. Even more problematic, the provision is unclear

[10]It is instructive to consider Title 28, Section 1391 of the United States Code, which governs venue in federal courts, provides for jurisdiction when the action is based on diversity of citizenship or federal question, and specifies where the suit may be filed if the defendant is a corporation, if the defendant is an alien, if the defendant is an officer or employee of the United States or any agency, acting in his official capacity, or if the defendant is a foreign state. By contrast, most of these categories of defendants are simply ignored by Section 4 of H.R. 4571.

as to whether the statute of limitations would be tolled during such appeal (the statute is tolled until the claim is dismissed under the bill, but what about afterwards until a new claim is filed?). The provision will also cause delays because it requires the state court to make another time consuming and costly determination before accepting or dismissing the case. Again, these delays should not bother a defendant, but what about a victim who may be in drastic need of medical attention and expenses?

Beyond this, it seems fundamentally unfair for Section 4 to apply only to personal injury lawsuits when studies show that business lawsuits are far more prevalent and costly. In fact, a study by Public Citizen shows that businesses file four times as many lawsuits as do individuals represented by trial lawyers.[11] Another paper, reported by the National Law Journal in November 2003, showed that of the top ten jury verdicts rendered thus far that year, 8 of the 10 involved businesses suing other businesses—accounting for $3.12 billion of the total $3.54 billion awarded by the ten juries. Only two of the ten cases were brought by individuals for personal injuries.[12] If the Majority believes so strongly in the efficacy of this forum shopping provision, why are they unwilling to apply it across the board?

Conclusion

We are happy to work with the Majority in reigning in frivolous lawsuits, but surely we can go after the frivolous cases without harming the ability of civil rights actions to be brought. We are willing to consider the issue of forum shopping, if it can be documented, but surely we can do better than passing legislation which so explicitly benefits foreign corporations at the expense of their U.S. counterparts and so massively tilts the playing field in favor of defendants. We urge the Majority to reconsider this ill-timed and ill-considered legislation.

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Jerrold Nadler
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[11]America's Litigious Businesses, September 2004, study on file with Judiciary Committee.

[12]It is worth noting that Public Citizen's survey of the 100 most recent decisions by federal judges finding Rule 11 violations found that businesses were almost twice as likely as personal injury plaintiffs to be sanctioned for engaging in frivolous litigation.